IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 53 of 2004
With
CIVIL APPLICATION No. 4751 of 2004
In
SECOND APPEAL No. 53 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAJAPATI RANCHHODBHAI BABABHAI & 1 - Appellant(s)
Versus
MANIBEN WD/O DAHYABHAI GULABCHAND PRAJAPATI & 3 - Defendant(s)

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Appearance :

MR JA ADESHRA for Appellant(s) : 1 - 2.
None for Defendant(s) : 1 - 2.
NOTICE SERVED for Defendant(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5 - 2, 2.2.3, 2.2.4, 2.2.5,2.2.6 - 4.
MR MITESH R AMIN for Defendant(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5 - 2, 2.2.3,2.2.4
DELETED for Defendant(s) : 2.2.1
- for Defendant(s) : 0.0.0

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 01/09/2006

ORAL JUDGMENT

1. The appeal is admitted for hearing on the following substantial questions of law;

(i) Whether in a suit of plaintiffs can the court pass an order of permanent injunction against the plaintiffs at the instance of the defendants and that too on an interim application Exh.19, in which prayer was for interim injunction till the decision of Regular Civil Suit No.40 of 1988?

(ii) Whether in absence of any counter-claim by the defendants and in view of provisions contained in Order 8 Rule 6-A, 6-B and 6-C of the Code of Civil Procedure, the trial court and lower appellate court erred in granting permanent injunction against the plaintiffs at the instance of the defendants?

2. With the consent of the parties, the matter is finally heard.

3. That the plaintiffs being aggrieved by the assertion of the

defendants that they have some right to pass through the plaintiffs' land, filed a suit seeking injunction against the defendants. In the said suit, he also made an application for grant of interim injunction, the defendants after putting their appearance, filed an application for grant of injunction restraining the plaintiffs from interfering with their right of way, they also filed their written statement. It is to be noted that no counter claim was filed by the defendants as required under Order 8 Rule 6-A of the Code of Civil Procedure. The learned trial court, after recording evidence and hearing the parties, dismissed the suit of the plaintiffs, but at the same time, took up the defendants' application Exh.19 which was for grant of interim injunction, as counter claim and issued an order of restraint against the plaintiffs from interfering with the defendants' right of way. The matter was, thereafter, taken up in appeal at the instance of the plaintiffs. The appeal was dismissed, therefore, the plaintiffs are before this Court.

4. Mr.J.A. Adeshra, learned counsel for the appellants submits that Order 8 Rule 6-A and other provisions of Order 8 of Code of Civil Procedure are complete Code in

itself, when they talk about the rights of the defendants to file a counter claim. According to him, a counter claim may be in the written statement itself or may be separately filed and thereafter, an opportunity is to be given to the plaintiffs to file its written statement and in case the court comes to the conclusion that contentious issues arise from the pleadings, then the issues are to be cast and only then a finding can be recorded. He submits that filing of an application for grant of ad-interim injunction / interim injunction could not be taken to be submission of a counter claim. He submits that the learned trial court was absolutely unjustified in granting an injunction against the plaintiffs.

5. Mr.Brijesh Limbachiya, learned counsel under the instructions of Mr.Mitesh Amin, learned counsel for the respondents – defendants submits that in view of the findings recorded by the learned trial court, the trial court was not unjustified in passing an order in its jurisdiction of equity. He submits that from the findings recorded by the two courts below, it would clearly appear that the defendants were exercising a right and the plaintiffs were trying to interfere with the said right.

6. After hearing the parties and going through the provisions of Rule 6-A, 6-B and 6-C of Order 8 of the Code of Civil Procedure, I must immediately record that the defendants were required to specifically plead their counter claim, show cause of action for counter claim and pay appropriate court fees on the same. Immediately after the counter claim is filed / submitted, the Court would call upon the plaintiff to file his written statement in reply to the counter claim and thereafter the trial court would be obliged to cast issues into the claim raised by the defendants and only thereafter, the trial court would proceed with the trial and decide all the issues. In the present case, undisputedly no counter claim was filed by the defendants, they made a simple application for grant of ad-interim injunction. It would be trite to say that interim / inter-locutory application serve out their purpose immediately when an order is passed on the said application. In a given case, once an application is granted in favour of a party, then the application does not survive and it cannot be taken to be a counter claim. In the present matter, the application Exh.19 was an application for grant of ad-interim relief and not for grant

of a decree in favour of the defendants.

7. As the defendants did not file any counter claim, learned trial court had no jurisdiction to grant a decree in favour of the defendants.

8. The decree granted by the trial court and confirmed by the learned first appellate court relating to grant of injunction in favour of the defendants, is beyond the jurisdiction of the trial court. The said decree deserves to and is accordingly set aside.

9. It is, however, made clear that on the merits of the matter and the findings recorded by the learned courts below, this court is not making any observations, because the said findings were not challenged before this Court, therefore, the said findings remain undisputed. The appeal is allowed to the said extent with a clarification that if advised, the defendants would be entitled to approach appropriate forum in appropriate proceedings seeking a relief of injunction, as was claimed by them in the suit vide their application Exh.39.

10.Let a decree be framed accordingly.

11.In view of the final disposal of the Second Appeal, no orders in Civil Application No.4751 of 2004 are needed. The said application stands disposed of.

(R.S.GARG,J.)

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